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Supreme Court, U.S.
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No. 92-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT O. STUART,
Petitioner,

v.

WALTER WINTER, GOLDEN ENTERPRISES, INC., GOLDEN ENTERPRISES, INTERNATIONAL, INC., and WINTER (WALTER W.) INVESTMENTS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL H. KAHN
KAHN & KAHN, P.A.
482 N. Harbor City Boulevard
Melbourne, Florida 32935
(407) 242-2564

SIDNEY O. SMITH, JR.
(Counsel of Record)

DONNA P. BERGESON
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
Attorneys for Respondents

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Erie* doctrine is applicable where there is no conflict between federal and state law?

2. Whether a district court's determination in a bench trial that no partnership existed is an appropriate issue to review by certiorari pursuant to Supreme Court Rule 10?

3. Whether a district court's rulings on the admission of evidence at a bench trial are appropriate issues to review by certiorari pursuant to Supreme Court Rule 10?

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I.
STATEMENT OF THE CASE

A. *Course of Proceedings.*

Petitioner filed his Complaint against Respondents Walter Winter ("Winter") and Golden Enterprises, Inc. ("Golden") on July 28, 1989, alleging breach of an oral partnership agreement and requesting the district court to grant an accounting and impose a constructive trust. (R1-1). Petitioner moved for Summary Judgment on December 8, 1989. (R2-37). On February 2, 1990, the district court denied Petitioner's Motion for Summary Judgment. (R3-61). Petitioner filed a Motion to Amend its Complaint to Join Additional Parties on April 4, 1990 (R4-86) which was granted. (R4-106). Petitioner thereupon filed an Amended Complaint on April 30, 1990 (R4-122), which was answered by Respondents, who asserted affirmative defenses and counterclaims. (R7-180). On April 25, 1990, the district court entered a preliminary injunction which allowed the conduct of normal business activities, but otherwise maintained the status quo by preserving the assets of Golden pending decision of whether a partnership was formed between the parties. (R4-119). On April 30, 1990, a Stipulation and Joint Motion was filed which was granted by the court on May 2, 1990, in which all parties requested the district court to separate the issue of the existence, terms, respective rights, duties and contributions of the alleged partners (denominated "Partnership Issues") for purposes of discovery and trial from all other issues, including affirmative defenses (although the statute of frauds was later tried by consent). (R5-124; R5-N).

From February 14, 1991, through February 22, 1991, a bench trial was held before the Honorable Richard B. Kellam, Senior Judge sitting by designation, solely on the issue of whether a partnership existed between Robert O. Stuart ("Petitioner") and the Respondents. (R12-R22). On June 12, 1991, the district court entered its Opinion and Order (Petition, A4-A27) which found, *inter alia,* that no partnership was ever formed between Stuart and either Winter or Golden. On July 8, 1991, the district court entered a Final Judgment with regard to the Partnership Issues which stated that Respondents never formed a partnership or

agreed to form a partnership with Stuart at any time for any purpose. (Petition A3). Therefore, the preliminary injunction entered to preserve the assets of Golden pending trial on the Partnership Issues was dissolved. (Petition A3).

On June 26, 1991, Petitioner filed a Notice of Appeal. (R11-294). Jurisdiction in the Court of Appeals was founded upon 28 U.S.C. §§ 1291 and 1292(a). The Court of Appeals affirmed the decision of the district court on October 20, 1992, without opinion (Petition A1), pursuant to 11th Cir. Rule 36-1, which allows for an affirmance without opinion where "an opinion would have no precedential value."

B. ***Statement of Facts.***

Pursuant to Supreme Court Rule 15.1, Respondents assert that the majority of facts set out in the Petition have been misstated, because they were disbelieved by the district court. Respondents set out hereafter its statement of facts, the gist of which is set out and adopted in the district court's Opinion and Order. (Petition, A4-A27).

Winter has been involved with technical aspects of and marketing in the telephone industry since the 1970's. (R19-p.309; R20-pp.145-156). Winter formed Golden Enterprises, Inc. in 1974. (R19-p.243). Traditionally, Golden has held Board Meetings in June of each year. Winter took minutes, typed them up soon after each Board meeting and made them available for review by Board members. Furthermore, the minutes of each previous meeting were reviewed at the following annual Board Meeting. (R20-pp.161-162, 167-169; R21-pp.237, 285-286, 289-290). Winter and Golden have developed a series of devices which were designed to improve the tone of service of telephone operators. (R20-pp.145-155).

In 1982, Golden employed Dr. Kathleen Thomas as a consultant to review an instructional program developed by Golden. (R20-pp.116-119, 156-158). In reviewing the program, Dr. Thomas became acutely aware of the tedium, fatigue and

repetitive nature of the telephone operator's job. (R20-pp.119-121). In April or May of 1983, Dr. Thomas told Winter that one way of truly improving the tone of service of a telephone operator while reducing the stress, fatigue and tedium of the operator's job would be to record the operator's voice and automate the greeting phrase portion of the call. (R20-pp.120-122, 158-159). Winter reported her suggestion to the Board of Directors of Golden at its annual meeting on June 1, 1983 and tasked an engineer employed by Golden, Steve Gothard, to ascertain whether Dr. Thomas' suggestion was technologically feasible. (Def. Ex. 24; R20-p.160; R21-pp.211-212). In the summer and early fall of 1983, Golden pursued the development of the new device which was later named the Personalized Response System ("PRS"). (R21-pp.213-214).

Petitioner, Robert Stuart, had worked for Indiana Bell since 1962 in a variety of different jobs. (R13-pp.223-224). In 1983, Petitioner was a Division Manager for Indiana Bell in charge of operator services. (R13-p.226). By January, 1984, Golden had developed a PRS prototype; therefore, Dr. Thomas wrote Petitioner, now an AT&T employee, on January 20, 1984 and recommended the use of the PRS as one way of improving operator tone of service. (Def. Ex. 8; R20-pp.125-126). In late January or early February, 1984, Winter and Dr. Thomas met with Petitioner in Indianapolis. At a dinner meeting, Winter and Thomas presented in detailed fashion the PRS concept to Petitioner and one of his staff members at AT&T, Ms. Cheri Erwin ("Erwin"). (R20-pp.49-57, 122-124; R21-pp.216-217). After the meeting, Petitioner gave Erwin the job of working with Winter, on behalf of AT&T, to help develop the PRS device. (R20-pp.57-58; R21-pp.217-218).

On April 18, 1984, Golden applied for a patent on the PRS. In the early summer, 1984, AT&T's interest in the PRS accelerated. In July, 1984, Petitioner wrote to Mr. William McGowan, an AT&T division manager, and mentioned that AT&T might be interested in becoming Golden's partner in joint development of

the PRS product. (Def. Ex. 16; R15-pp.249-251). Petitioner testified that Winter was interested in having AT&T as a partner because of Golden's lack of funds. Winter also believed that the prospect of marketing the PRS would be greatly enhanced with AT&T as Golden's partner. (R15-pp.228, 251).

After AT&T evinced interest in the PRS, Petitioner began to pressure Winter to give him stock in Golden or to form a partnership with Winter and/or Golden. (R21-pp.235-236). However, Petitioner testified that he was only interested in being a stockholder or partner if the PRS achieved success. (R16-pp.35, 42-43, 51; R22-p.52). Winter told Petitioner that Golden had minority shareholders, that each shareholder was a member of the Board and had one vote, and that the Board would have to approve Petitioner's request for stock or any partnership. (R16-pp.55-56; R20-pp.169-170). On June 30, 1984, at Golden's annual Board Meeting, Winter formally conveyed Petitioner's request for stock to the other board members. The Board refused Petitioner's request for stock. (Def. Ex. 25; R21-pp.237-240). Winter told Petitioner of their refusal soon thereafter. (R21-p.239).

On August 15, 1984, AT&T convened a committee to study the PRS, which held monthly meetings. (R21-pp.248-249). However, after several trials, AT&T rejected industry-wide implementation of the PRS on January 27, 1986. (Def. Ex. 44; R15-pp.252-256; R21-pp.272-273). Petitioner continued to press Winter for Golden's stock even after AT&T rejected the PRS. Winter reported Petitioner's demands to his fellow board members at the Board of Directors' Meeting on June 14, 1986. As before, the Board rejected Petitioner's demands. (Def. Ex. 27; R21-pp.285-288). Thereafter, Petitioner wrote Winter on August 6, 1986, offering three different partnership proposals. In the letter, Petitioner requested Winter accept one of the proposals in writing by August 25, 1986, which Winter never did. (R16-pp.101-102; Def. Ex. 14). The first of two patents with respect to the PRS device was issued on November 18, 1986, with Walter Winter, John Drew and Steve Gothard, all Golden employees, named as inventors. (*See generally* Pl. Ex. 16).

II.
SUMMARY OF THE ARGUMENT

Respondents respectfully assert that this case does not fit within the parameters of Supreme Court Rule 10 which authorizes discretionary review. This case does not involve an issue where there is a conflict among the circuits, does not involve a federal question nor does it involve a departure by the district court (or the Eleventh Circuit Court of Appeals) from the accepted and usual course of judicial proceedings. Rather, this case involves a garden variety factual dispute. The recitation of the "facts" by Petitioner throughout his submission is nothing more than a repetition of the allegations claimed by Petitioner throughout the trial which were rejected by the district court. This case was deemed to have such little "precedential value" that, pursuant to local rule, the Eleventh Circuit affirmed the district court *per curiam* without opinion.

The only issue submitted to the district court for determination was whether a partnership was created between Petitioner and Respondents. In the Pretrial Stipulation, the parties stipulated that Indiana law governed the issue, and the question was posed to the district court without a jury. Under Indiana law, the question of the existence of a partnership is one of fact. The trial court heard the evidence and concluded that no partnership was formed between the parties.

Federal Rule of Civil Procedure 52(a) sets forth the standard of review for civil actions tried without a jury. Rule 52(a) mandates that findings of fact not be set aside unless clearly erroneous. Contrary to being erroneous, evidentiary support for the court's ruling is plentiful. In the five and one-half day bench trial, the district court had ample opportunity to judge the credibility of the witnesses and determine the weight to be given to the sharply conflicting evidence presented by both sides. The judge believed Respondents' witnesses, and found Petitioner's witnesses to be collectively and individually incredible.

Respondents do not believe the *Erie* doctrine is applicable or even relevant to the instant case. There is no conflict between federal and state law which would bring the *Erie* doctrine in issue. Petitioner's argument on the *Erie* doctrine is a poorly disguised effort to transform the credibility rulings of the district court into a package more likely to be accepted by this Court on a petition for writ of certiorari.

Finally, Petitioner's assertions of error in the admission of evidence by the trial judge are groundless. The assignment of error in the "admission" of Wands' testimony is curious since the testimony was not admitted, and the exclusion of patent histories due to Petitioner's failure to list them on the pretrial order was within the district court's discretion. No abuse of discretion occurred in the judge's evidentiary rulings, and such rulings are not of a nature worthy of review by this Court on a writ of certiorari.

III.
ARGUMENT AND CITATIONS OF AUTHORITY

A. *This Case Does Not Warrant Discretionary Review Under Supreme Court Rule 10.*

Under Supreme Court Rule 10, a petition for certiorari will only be granted when there are "special and important reasons." While not exclusive, this Court's rules indicate examples of when the court will exercise its discretion and issue a writ of certiorari. This case does not fit within any of those examples. The case on review does not involve an issue where there is a conflict among the circuits, does not involve a federal question, nor does it involve a departure by the district court (or the Eleventh Circuit Court of Appeals) from the accepted and usual course of judicial proceedings. Rather, this case consists of a garden variety swearing contest. The district judge was required to determine the credibility of the witnesses, and he did so. The facts were resolved by the district court contrary to Petitioner's wishes, and now the Petitioner asks this court to review those factual rulings *de novo.*

In Petitioner's direct appeal, Petitioner asked the Eleventh Circuit to review the factual determinations of the district judge *de novo,* but the Eleventh Circuit Court of Appeals properly refused. The Eleventh Circuit affirmed *per curiam* without opinion in accordance with its local rule 36-1. Eleventh Circuit Rule 36-1 provides as follows:

> 11th Cir. R. 36-1 *Affirmance Without Opinion*. When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) judgment has been entered without an error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

The only circumstances possibly applicable to the present case are (a) or (e). The district court and the Eleventh Circuit both correctly viewed this case as resolving a credibility issue. The credibility of the parties was determined by the district judge and the Eleventh Circuit correctly decided not to revisit his rulings. This is certainly not a case appropriate for discretionary review by way of certiorari to the United States Supreme Court.

B. *The Erie Doctrine Is Inapplicable To This Case Because There Is No Conflict Between Federal And State Law.*

Petitioner misapplies the *Erie* doctrine, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), because, as he admits, there is no conflict between federal and state law in the case on review. Petition for Writ of Certiorari, p.14. The actual issue, which the Petitioner seems only dimly to have grasped, has nothing to do

with the *Erie* doctrine. The question is whether in a bench trial involving multitudinous factual findings based on credibility, Fed.R.Civ.P. 52(a) applies, which it clearly does.

All the cases cited in the Petitioner's brief relative to the *Erie* doctrine concern conflicts between federal and state laws which have been deemed by this Court either to be procedural or substantive and are a part of a body of law which rejected the early holding of this Court in *Swift v. Tyson*, 41 U.S. 1 (1842). *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). However, since Petitioner has admitted that in the instant case there is no conflict between Federal Rule of Civil Procedure 52(a) and any state law (Petition for Writ of Certiorari, p.14) the issues raised by the Petitioner concerning the Erie doctrine, including a revisitation of *Hanna v. Plummer,* have nothing whatsoever to do with this case.

C. *The Ruling of the Trial Court That No Partnership Was Formed Is Amply Supported By the Evidence.*

There was only one issue for determination by the district court: whether a partnership was formed between Petitioner and Respondents. Petitioner alleged a partnership was formed; Respondents asserted no partnership was created between the parties. The burden of proof was with the Petitioner to prove by a preponderance of the evidence the existence of a partnership. *Knowles v. C. I. T. Corp.*, 346 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977). After a five and one-half day trial, the experienced trial judge found that Petitioner had not carried his burden and ruled that no partnership was formed between the parties. This ruling is clearly supported by the evidence.

Since there is no written document establishing a partnership, Petitioner had the burden of establishing a valid oral partnership with the Respondents. Under either Indiana or Florida law, a partnership is defined as requiring (1) an association of two or more persons; (2) to carry on a business; (3) for profit; (4) as co-

owners. Ind. Code § 23-4-1-6; Fla. Stat. Ann. § 620.585. Four important facts, *as found by the district judge* in his Opinion and Order (Petition A4-A28), support the determination that no partnership was formed between the parties:

1. There was no evidence of sharing costs of the alleged partnership. (Petition A21).

2. The PRS (Petitioner's alleged contribution to the partnership) was not the concept, design or product of Petitioner. (Petition A3, Petition A21).

3. Petitioner contended only one partnership was formed and that it was formed in June 1983 (Petition A18); yet, a letter written by Petitioner to Respondents over three years later on August 6, 1986, discussed the purported partnership in such a prospective and speculative fashion so as to impeach Petitioner's claims. The court concluded the letter "hardly suggests that there is already a viable partnership." (Petition A25).

4. The district court found as a fact that any assistance which Petitioner provided Respondents in the development of the PRS was pursuant to Petitioner's official position with his employer, AT&T, to improve customer service. (Petition A21).

In the Pretrial Stipulation filed in the proceedings below, the parties agreed that Indiana law would govern the issue of the existence of a partnership. (R9-235).[1] Indices of partnership that are recognized by the law of Indiana following the Uniform Partnership Act include: 1) receipt of profits from the business, *In re Zeits,* 31 N.E.2d 209 (Ind. Ct. App. 1941); and 2) contribution to losses, Unif. Partnership Act § 18(a); Ind. Code Ann. 23-4-1-18

[1] Regardless of the stipulation that Indiana law applies, (R9-235), Plaintiff at times also argues that Florida law applies. This distinction is immaterial because both Indiana and Florida have adopted the Uniform Partnership Act and the operative definition of a partnership is the same under either law. Ind. Code Ann. § 23-4-1-6 (Burns); Fla. St. Ann. § 620.585 (West).

(Burns). When seen in the light of these tests as regards to the existence of a partnership relation, Petitioner's case falls far short. Petitioner did not share in the profits of Golden (R16-p.32), nor did he share in any losses. (R16-p.32). Since a partnership agreement can commence only by the voluntary contract of the partners, Indiana law has unequivocally held that the question of the existence of a partnership is one of fact. *J.M. Schultz Seed Co. v. Robertson,* 451 N.E.2d 62, 64 (Ind. Ct. App. 1983); *Musgrave v. Madonna,* 341 N.E.2d 789, 790 (Ind. Ct. App. 1976).

The standard of review for a case tried to a district court without a jury is set out in Fed. R. Civ. P. 52(a):

> [f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The clearly erroneous standard of review was first addressed in the case of *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948). In that case, this Court stated that, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. Pursuant to the clearly erroneous standard of review, the district court's findings of fact are presumptively correct. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 2585 (1971).

This Court recently reaffirmed the clearly erroneous standard of review and explained that it is a deferential one, stating that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Amadeo v. Zant,* 486 U.S. 214, 223 (1988); *see also United States v. United States Gypsum Co.,* 333 U.S. 364; *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969).

After examining the contributions that Petitioner claims he made to the purported partnership, the district court ruled that "[a]ny assistance which Petitioner gave [with regard to the PRS] was as an employee of Indiana [Bell] and AT&T". (Petition A21). The trier of fact further found that

> [t]here is little doubt that Petitioner expressed his approval of PRS and wanted it developed for the benefit of AT&T. It was a part of his official position with the telephone companies to improve the customer service. AT&T was indeed interested for it assigned employees to work with Winter on the project and appointed a committee to attend demonstrations to determine whether or not it would be of value to the Company.

(Petition A21). The district court concluded that, "Stuart probably saw that PRS had possibilities and no doubt would like to have had some share in it, but the court is fully satisfied from the weight of the evidence that neither Winter nor Golden entered into any partnership with Stuart in June of 1983, or at any other time." (Petition A21). These findings and conclusions of the district court are consistent with the evidence, and ought not be disturbed.

It is not sufficient merely to allege, without support, as Petitioner does, that the issue of the existence of a partnership is a question of law rather than one of fact. (Petitioner Brief, p.19). To pull the district court's findings out from under the aegis of Rule 52(a), Petitioner must specify to this Court the erroneous theory of law under which the district court allegedly was operating, not just barely assert that he disagrees with the court's conclusions. *E.g., Meek v. Metropolitan Dade County,* 908 F.2d 1540, 1544 (11th Cir. 1990), cert. denied, 111 S. Ct. 1108 (1991); *City of Carrollton Branch of the NAACP v. Stallings,* 829 F.2d 1547, 1554 (11th Cir. 1987), *cert. denied,* 485 U.S. 936 (1988); *Solomon v. Liberty County, Fla.,* 899 F.2d 1012, 1018 (11th Cir. 1990), *cert. denied,* 111 S. Ct. 670 (1991).

Petitioner misreads *Uhrig v. Redding*, 8 So.2d 4 (Fla. 1942), in making his tortured analysis. *Uhrig v. Redding* stands for the well-recognized proposition *that once the facts are found,* the conclusion of whether those facts are sufficient to establish the claim is one of law. "The question to be determined is one of law — *i.e.*, whether the facts as found by the Chancellor and herein recited show that a partnership existed." *Id.* at 5. Stated differently, the existence of a partnership is based upon a series of factual findings which become a conclusion of law when taken in the aggregate. For example, if the district court found, as fact, that Petitioner and Respondents had (1) joined together (2) to carry on a business (3) for profit (4) as co-owners, it would be an error of law to conclude that no partnership existed. Here, the district court concluded that no such association was formed. Rather, the court found as a fact that while Petitioner assisted Respondents, such assistance was not in pursuit of a business as co-owners for profit, but was rather pursuant to Petitioner's official position with his employer to improve customer service for AT&T. (Petition A21). *Uhrig v. Redding* does not stand for the proposition that an appellate court can make a *de novo* review of the credibility determinations and factual findings made by the district court.

D. *The Trial Court Correctly Ruled On The Admission Of Evidence, But If There Was Error, It Was Harmless Error.*

Petitioner alleges error by the district judge in ruling on the admissibility of two items of evidence: witness testimony and two patent histories. In a nonjury trial, the judge is granted considerable latitude in the admission or exclusion of evidence. *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981). The admissibility of evidence is within the sound discretion of the district court, and, even if error is found, it must rise above the threshold of harmless error. *Perry v. State Farm*, 734 F.2d 1441, 1446 (11th Cir. 1984) *cert. denied*, 469 U.S. 1108 (1985). The above standard applies in considering both of the items of evidence complained of by Petitioner, which are discussed more fully below.

1. *Testimony From Respondent's Patent Counsel Was Never Admitted.*

Petitioner contends it was error to permit Respondents' patent counsel to testify because defense counsel also asserted the attorney-client privilege to certain discovery requests. Questioning by Respondents of Golden's patent counsel, Charles Wands, at trial was entirely proper. An examination of the questions posed to Wands by the Respondents and his answers clearly show that nothing was elicited which violated the attorney/client privilege. It is axiomatic that the attorney/client privilege is not waived merely by an attorney taking the stand and testifying; waiver occurs only when the substance of a privileged communication is revealed. Charles W. Ehrhardt, *Florida Evidence* § 507.1 (1992); Fla. Stat. Ann. § 90.507 (West); *see, e.g. Seaboard Air Line Ry. v. Parker*, 62 So. 589, 590 (Fla. 1913).

More to the point, however, the testimony of Wands was never admitted. At trial, the court allowed the evidence to be put in the record, but withheld ruling on whether to consider the evidence. (R21-pp.180, 185, 189). Ultimately, the district judge never admitted the evidence, and Wands' testimony was not cited in the Court's Opinion and Order. (Petition A4-A27). *McComb v. McCormack*, 159 F.2d 219, 227 (5th Cir. 1947) (admission of testimony of Petitioner's managing executive was not prejudicial error since it was tried by the court without a jury and clear from the court's findings and opinions that he gave it no weight in his decision).

2. *Two Patent Histories Were Correctly Excluded.*

Petitioner raises the issue that it was prejudicial error for the trial court to refuse to admit in evidence patent histories of the PRS which he tendered during the cross-examination of Wands. This argument is both factually and legally flawed. From a factual standpoint, and as noted above, none of the testimony of Wands was ever admitted due to *Petitioner's* objection. Since these documents were tendered by Petitioner during that testimony, and the testimony was never admitted, no proper foundation has been laid

for admission of the documents. *Southern Stone Co. Inc. v. Singer,* 665 F.2d 698, 703 (5th Cir. Unit B Jan. 1982) (no foundation was laid for admission of document because it was hearsay and attorney didn't take stand or otherwise lay foundation for hearsay exception).

Moreover, the documents were excluded by the district court because they were not listed on Petitioner's pretrial exhibit list, as mandated by Rule 3.06(C)(4) of the Local Rules for the Middle District of Florida. Trial courts are responsible for the orderly administration of their cases, and if a party ignores the local rules on identifying witnesses and documents in their pretrial submissions, they do so at their peril. *United States v. Koziy,* 728 F.2d 1314, 1320-21 (11th Cir.) *cert. denied,* 469 U.S. 835 (1984) (district court did not abuse discretion in excluding testimony from witnesses not disclosed as trial witnesses by deadline required by the court); *Kennan v. Dow Chem. Co.,* 717 F. Supp. 799, 801 (M.D. Fla. 1989) (court granted the defendant's motion to exclude any evidence not specifically listed by the plaintiff in the pretrial stipulation).

Further, in order for error to be reversible error, it must affect a substantial right, and the party asserting error has the burden of demonstrating this fact. *Perry v. State Farm,* 734 F.2d at 1446. In this case, Petitioner has not demonstrated that admission of the patent histories would have changed the court's mind on whether a partnership existed. As such, even assuming, *arguendo,* there was error, it did not affect the outcome of the case.

IV.
CONCLUSION

The only issue submitted to the district court was whether a partnership was formed between Petitioner and Respondents. The district court found implausible and unbelievable Petitioner's claim that a partnership existed and found Petitioner was not entitled to an accounting or the imposition of a constructive trust.

The court found that Petitioner did not originate the PRS concept, did not contribute the PRS concept to any alleged partnership, and that whatever Petitioner did in furtherance of the development of the PRS he did as an AT&T employee. (Petition A21). These are factual findings which are supported by the evidence. The district court heard the evidence, observed the demeanor of witnesses and resolved the disputed issues. Applying the clearly erroneous standard to the factual issues and the abuse of discretion standard to the evidentiary issues, the Eleventh Circuit Court of Appeals affirmed the comprehensive and well-written Opinion and Order of the district court, without opinion since "an opinion would have no precedential value." Eleventh Circuit Rule 36-1. Similarly, this case does not involve any "special and important reasons" which would require review on writ of certiorari under Supreme Court Rule 10. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted this 11th day of February, 1993.

Michael H. Kahn
KAHN & KAHN, P.A.
482 N. Harbor City Boulevard
Melbourne, Florida 32935
(407) 242-2564

Sidney O. Smith, Jr.
(Counsel of Record)

Donna P. Bergeson
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
Attorneys for Respondents